

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

ITC^DeltaCom Communications, Inc.,

Plaintiff,

v.

BellSouth Telecommunications, Inc.,
Federal Communications Commission,
and The Tennessee Regulatory Authority,

Defendants.

Case No. ~~3~~ 04 0611
JUDGE TRAUGER

COMPLAINT FOR DECLARATORY JUDGMENT

The Plaintiff ITC^DeltaCom Communications, Inc. respectfully states as follows in support of its cause of action against the Defendants:

Jurisdiction and Venue

1. This suit is brought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, which provides this Court with subject matter jurisdiction over these proceedings. In addition, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which specifically authorizes this Court to interpret the Constitution, laws or treaties of the United States.

2. The Defendant BellSouth Telecommunications, Inc., does business in this district and is subject to the personal jurisdiction of this Court, and therefore is deemed to reside in this district, pursuant to 28 U.S.C. §1391(c). A substantial part of the events or omissions giving rise to this Complaint for Declaratory Judgment occurred within this district. Accordingly, this Court is the proper venue for these proceedings pursuant to 28 U.S.C. §1391.

Parties

3. The Plaintiff, ITC^DeltaCom Communications, Inc. (“ITC^DeltaCom”), is an Alabama corporation with its principal place of business located in West Point, Georgia. ITC^DeltaCom is a telecommunications company in competition with the Defendant BellSouth Telecommunications, Inc. in the provision of local telephone service to customers in Tennessee and other areas.

4. The Defendant, BellSouth Telecommunications, Inc. (“BellSouth”), is a Georgia corporation with its principal place of business located at Suite 1800, 1155 Peachtree Street N. E., Atlanta, Georgia 30309-3610.

5. The Defendant, the Federal Communications Commission (“FCC”), is a federal commission created by Congress pursuant to 47 U.S.C. § 151.

6. The Defendant, the Tennessee Regulatory Authority (“TRA”), is a state commission created by the Tennessee General Assembly pursuant to T.C.A. § 65-1-201 for the purpose of regulating public utilities. The TRA is a State commission as that term is used in the Federal Telecommunications Act at 47 U.S.C. § 252.

Regulatory Background

7. On February 8, 1996, Congress passed the Telecommunications Act of 1996 (the “Federal Telecommunications Act” or “Act”). A central purpose of the Act is to promote competition in local telephone markets by ending regulated monopolies enjoyed by incumbent telephone companies such as Defendant BellSouth.

8. In order to promote competition in local telephone markets, the Act requires local incumbent telephone companies (such as Defendant BellSouth) to lease to their competitors parts of their network, such as lines and switches. See 47 U.S.C. § 251 et seq. Under Section 251 of the Act, if a competing carrier (such as ITC^DeltaCom) is “impaired”

without access to a particular network element, then the incumbent telephone company (such as BellSouth) is required to make that network element available at a price established by state regulators. State regulators establish the price for leasing the network element in accordance with the Act and in accordance with rules and orders issued by the FCC. The pricing formula used to determine the rate for leasing such network elements is called the total element long-run incremental cost ("TELRIC") formula, a formula that has been approved over incumbent telephone company challenges by the United States Supreme Court.

9. Competing carriers lease network elements from incumbent telephone companies under agreements that are called "Interconnection Agreements." Under Section 252(e) of the Act, all Interconnections Agreements must be filed with, and approved by, the state commission of each state where the respective carriers operate.

10. Separately, Section 271 of the Act applies to former Bell operating companies, i.e., companies such as BellSouth that were part of the monopoly Bell System that was broken up in 1984. After the Bell System break-up, those companies were forbidden to provide long distance services. Section 271 offers Bell operating companies the opportunity to reenter the long distance market if they make their local networks open to competition. BellSouth has availed itself of that opportunity and is now permitted to provide long distance service in Tennessee and in all of the other states in which it operates. Section 271 requires Bell operating companies such as BellSouth to make certain network elements available to competitors at nondiscriminatory prices even when there is no showing of "impairment". Under such circumstances, the lease rate must be "just and reasonable" as traditionally found in Sections 201 and 202 of the Act and comparable provisions of state law. See T.C.A. § 65-5-201 and 203.

11. Under Section 271 of the Act, Bell operating companies such as BellSouth must offer network elements either through Interconnection Agreements or through a "Statement of Generally Available Terms and Conditions." Under Section 252, every Interconnection Agreement, as well as every Statement of Generally Available Terms and Conditions, must be filed with, and approved by, the state commission of every state within which the competitor operates.

12. Section 252 of the Act provides that, if an incumbent telephone company and a competing carrier cannot agree upon the terms of an Interconnection Agreement, then the competing carrier may file a petition for compulsory arbitration before the state utility commission governing the subject local market. See 47 U.S.C. § 252(b)(1) (providing that competing carriers may "petition a State commission to arbitrate any open issues").

13. The Federal Telecommunications Act vests state utility commissions (such as the Defendant TRA) with the authority to resolve all issues raised in an arbitration petition filed by a competing carrier and all issues raised in the response filed by the incumbent telephone company. Specifically, Section 252 (b)(4)(C) of the Act provides that: "[t]he State commission shall resolve each issue set forth in the petition and response . . ."

14. Under Section 252(e)(6) of the Act, any party aggrieved by a state commission ruling in an arbitration proceeding may appeal that ruling federal to district court. Such an appeal to federal district court is the exclusive means by which an aggrieved party may seek review of a final state commission arbitration ruling. See GTE North, Inc. v. Strand, 209 F.3d 909 (6th Cir. 2000); MCImetro Access Transmission Serv., Inc. v. BellSouth Telecomm., Inc., 352 F.3d 872, 875-76 (4th Cir. 2003) ("A party aggrieved by the state utility commission's resolution of disputed issues may seek review of that decision in federal district court, which has exclusive jurisdiction over such matters."); MCI Telecomm. Corp. v. Bell-Atlantic Pennsylvania,

271 F.3d 491, 512 (3d Cir. 2001) ("[A] state commission that decides to participate in that statutory scheme is on notice from the outset that it will be subject to suit, brought only in federal court, by any party aggrieved by its decision."); MCI Telecomm. Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 337 (7th Cir. 2000) ("Congress envisioned suits reviewing 'actions' by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court").

15. Under the Act, the parties to an arbitration may seek relief from the FCC only if the state commission fails to act on an arbitration petition. See 47 U.S.C. § 252(e)(5).

FACTS

16. On February 7, 2003, the Plaintiff ITC^DeltaCom filed a petition for arbitration before the Defendant TRA pursuant to Section 252 of the Act. Through that petition for arbitration, ITC^DeltaCom asked the TRA to resolve several issues regarding a proposed Interconnection Agreement whereby ITC^DeltaCom would lease certain network elements from the Defendant BellSouth. Among the issues that ITC^DeltaCom raised in its arbitration petition was the appropriate rate for the leasing of non-impairment based switching under Section 271 of the Act. BellSouth joined issue on this matter and thus submitted itself to the authority of the TRA. During the TRA proceeding, both parties presented testimony suggesting appropriate switching rates.

17. On June 21, 2004, the TRA announced a decision in the arbitration proceeding, and BellSouth now desires to overturn that decision. Specifically, the TRA announced an interim rate for the leasing of switching under Section 271 of the Act (i.e., the rate to be charged even if there is no finding of impairment). In addition, the TRA opened a “generic proceeding”, applicable to all competing carriers, in order to establish a permanent rate for the leasing of local switching in the absence of impairment.

18. As stated above, Section 252(e)(6) of the Act specifically provides that any party aggrieved by a state commission ruling in an arbitration proceeding may appeal the ruling to federal district court. Such an appeal to federal district court is the exclusive means by which an aggrieved party may seek review of state commission arbitration rulings. See GTE North, Inc. v. Strand, 209 F.3d 909 (6th Cir. 2000); MCImetro Access Transmission Serv., Inc. v. BellSouth Telecomm., Inc., 352 F.3d 872, 875-76 (4th Cir. 2003) ("A party aggrieved by the state utility commission's resolution of disputed issues may seek review of that decision in federal district court, which has exclusive jurisdiction over such matters."); MCI Telecomm. Corp. v. Bell-Atlantic Pennsylvania, 271 F.3d 491, 512 (3d Cir. 2001) ("[A] state commission that decides to participate in that statutory scheme is on notice from the outset that it will be subject to suit, brought only in federal court, by any party aggrieved by its decision."); MCI Telecomm. Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 337 (7th Cir. 2000) ("Congress envisioned suits reviewing 'actions' by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court").

19. Under the plain language of Section 252(e)(6), as well as clear precedent from the Sixth Circuit and other circuits, BellSouth is permitted to obtain review of the TRA's decision only by bringing an action in federal district court. Moreover, BellSouth is not permitted to bring such an action until the TRA enters a final order announcing its decision. As of the date of the filing of this litigation, the TRA has not yet entered a final order incorporating its June 21, 2004 decision.

20. Rather than following the statutory mechanism prescribed by Congress for obtaining review of State commission arbitration rulings, the Defendant BellSouth filed an "Emergency Petition For Declaratory Ruling and Preemption of State Action" before the FCC on

July 1, 2004. Through that emergency petition, BellSouth asks the FCC to overturn the TRA's arbitration ruling.

21. BellSouth's emergency petition to the FCC is contrary to the clear dictates of 47 U.S.C. § 252(e)(6) and contrary to numerous federal court of appeals decisions. Through its premature petition, BellSouth attempts to engage in illegal and improper forum shopping in violation of procedures established by Congress for the review of state commission arbitration rulings.

22. Through its petition, BellSouth asserts that the TRA lacks jurisdiction to establish rates for the leasing of network elements under Section 271 of the Act even when such rates are an open issue in a Section 252 arbitration proceeding.

23. The substance of BellSouth's petition is contrary to the provisions of Section 252(b)(1) of the Act. That part of the statute provides that competing carriers may "petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(b)(1) (emphasis added). BellSouth's petition is also contrary to Section 252 (b)(4)(C) which states that: "[t]he State commission shall resolve each issue set forth in the petition and response . . ." Because the Act clearly authorizes state commissions, like the TRA, to resolve all open issues raised in Section 252 arbitrations, BellSouth's claim that the TRA does not have jurisdiction to do so is without merit. Moreover, under Sections 271 & 252 of the Act, an incumbent telephone company must offer network elements either through Interconnection Agreements or through a "Statement of Generally Available Terms and Conditions", each of which must be filed with, and approved by, the state commission of every state within which the competitor operates. Therefore, BellSouth's assertion that the TRA lacks jurisdiction to set Section 271 rates in the context of arbitration proceedings is wholly incorrect.

24. BellSouth should not be permitted to continue its illegal petition before the FCC. Accordingly, this Court should enter a judgment: (1) declaring that, in accordance with Sixth Circuit precedent, BellSouth's exclusive means of obtaining review of the TRA's arbitration ruling is to bring an action in this Court once the TRA memorializes its ruling through the entry of a final written order; (2) declaring that BellSouth's petition before the FCC is contrary to Section 252(e)(6) of the Act; and (3) directing the FCC to dismiss BellSouth's illegal petition.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff ITC^DeltaCom prays for:

A. An expedited hearing of this matter pursuant to Rule 57 of the Federal Rules of Civil Procedure;

B. A judgment declaring that, in accordance with Sixth Circuit precedent, BellSouth's exclusive means of obtaining review of the TRA's arbitration ruling is to bring an action in this Court once the TRA memorializes its ruling through the entry of a final written order;

C. A judgment declaring that the subject petition filed by BellSouth before the FCC is contrary to Section 252(e)(6) of the Act;

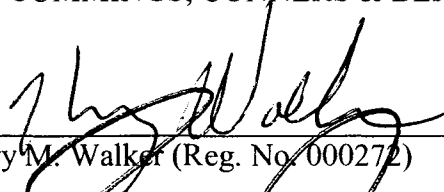
D. A judgment directing the FCC to dismiss BellSouth's petition; and

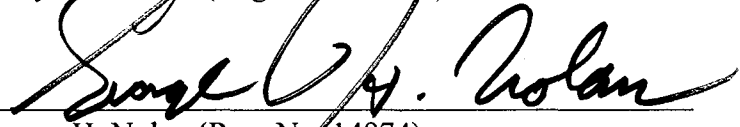
E. Such other relief as is just and equitable.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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